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BLACKSTONE, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW*

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Over recent years, Sir William Blackstone's *Commentaries on the laws of England*¹ have been receiving increasing attention.² Perhaps this is – as Professor Milsom has suggested – partly the result of growing interest in Blackstone's critic Bentham, and partly because 'the time always comes for having a go at a classic'.³ One of the most recent contributions to the expanding corpus of Blackstone studies is a complex article in this *Journal* by Professor Willman of Mississippi State University dealing with Blackstone's view that, in the reign of Charles II, the constitution of England achieved, in law, a theoretical perfection.⁴ Willman demonstrates that Blackstone believed this to be so because that reign saw, by statute, first, the virtual abolition of feudal tenures (12 Car. II, c. 24),⁵ second, the introduction of *habeas corpus*,⁶ and third, the abolition of the writ *de haeretico comburendo*.⁷ From this point of view, the events of 1688 did not constitute a major constitutional change but, rather, only resulted in the confirmation of the free constitution and liberties of the English people.⁸ Blackstone, according to Willman, saw these three statutes as restoring the ancient constitution.⁹ Drawing on Professor Pocock's *The ancient constitution and the feudal law*,¹⁰ Willman points out that the existence of an ancient constitution was a myth, articulated above all by Sir Edward Coke, from which it was argued that the liberties and laws of England dated from time immemorial.¹¹ From our perspective, what is important in the notion of the ancient constitution was that its upholders denied, first, that the accession of William of Normandy to the English throne was as a result of conquest, as a conquest was considered to invalidate prior

* I wish to thank Mr H. L. MacQueen for his useful criticism and comments. Mr Colin Hunter provided much needed encouragement.

¹ William Blackstone, *Commentaries on the laws of England* (hereafter cited as *Comm.*) (Oxford, 1765-9). Page references here for convenience will conform to the established practice of citing not the first, but the last edition in Blackstone's lifetime (the 8th).

² For a bibliography, see the references in J. W. Cairns, 'Blackstone, an English institutist: legal literature and the rise of the nation state', *Oxford Journal of Legal Studies*, iv, 3 (1984), 318-60.

³ S. F. C. Milsom, 'The nature of Blackstone's achievement', *Oxford Journal of Legal Studies*, i, 1 (1981), 1-12, at p. 2.

⁴ Robert Willman, 'Blackstone and the "theoretical perfection" of English law in the reign of Charles II', *Historical Journal*, xxvi, 1 (1983), 39-70.

⁵ II *Comm.* 77.

⁶ 31 Car. II, c. 2; I *Comm.* 137.

⁷ 29 Car. II, c. 9; IV *Comm.* 49. See Willman, op. cit. pp. 40-1.

⁸ Willman, op. cit. pp. 41-2.

⁹ Ibid. pp. 41-3.

¹⁰ J. G. A. Pocock, *The ancient constitution and the feudal law* (Cambridge, 1957).

¹¹ Willman, op. cit. pp. 42-3.

laws, and, second, that the Normans changed the English laws, which were dated to, above all, Alfred and Edward the Confessor: indeed, after the 'Conquest', the laws of the Confessor were supposedly confirmed.¹² In the course of the seventeenth century, the mythical nature of the ancient constitution came to be appreciated. Instrumental in this was a proper appreciation of the history of feudalism in England as having been introduced by the Normans, so that it became apparent that much of the common law did not in fact date back to Saxon times.¹³

Blackstone wrote long after the historical realization of the doubt feudalism threw on the existence and continuity of an ancient constitution, and he was fully aware of the works of Spelman and Hale that had exploded the notion of the immemorial nature of the common law. Yet, as Willman realizes, this poses an important problem, in that Blackstone relies on the concept of the ancient constitution in his account of the history of English law. Willman argues that Blackstone, drawing on Montesquieu, synthesized feudalism and the ancient constitution and thus argued that the ancient constitution was itself feudal, but of an early, benign and liberal type, later to be perverted by Norman lawyers.¹⁴ While Willman is undoubtedly correct that Blackstone was under a necessity to reconcile the theory of the ancient constitution with the historical fact of feudalism, Willman's contention that Blackstone argued that pre-Conquest society was 'feudal' seems based on a misreading of the *Commentaries*. This is an important point, since Willman relies on this interpretation of Blackstone's view of feudalism as a foundation for his argument that Blackstone stressed the Caroline legislation and denied the significance of 1688, because to give importance to the Revolution threatened acceptance of the continuity of the English law and constitution. Willman argues that Blackstone wanted to stress continuity because he wished to reject an argument, based on Locke's views, that the Revolution could have caused a reversion to a state of nature, whereby the people would have been free to constitute for themselves a new legislative power. Such acceptance of the possibility of reconstitution of government would have threatened the role of the aristocracy, which, according to Willman, Blackstone was anxious to preserve, as their leisure, experience and education freed them from narrow self-interest and made them proper guardians of the English constitution. Willman argues that Blackstone accordingly rejected Locke's rationalist view of the nature of the social contract, doubting the existence of a state of nature, and stressed instead the continuity of the English constitution, the very continuity of the laws showing their appropriateness for England and, indeed, giving them their legitimacy.¹⁵

In this paper, I shall focus on Willman's arguments on Blackstone's views on the introduction of feudalism into England and the abolition of military tenures by 12 Car. II, c. 24, commonly known as the Military Tenures Abolition Act, 1660. This Act abolished tenure by knight-service and its incidents, and the major incidents of tenure by grand serjeanty.¹⁶

The basis of Willman's argument may be set out simply.¹⁷ He points, first, to texts of the *Commentaries* where Blackstone claims that early Germanic society contained

¹² Pocock, *op. cit.* pp. 42-5.

¹³ *Ibid.* pp. 91-228.

¹⁴ Willman, *op. cit.* pp. 43-6.

¹⁵ *Ibid.* pp. 50-62 and 68-72.

¹⁶ On this Act see A. W. B. Simpson, *Introduction to the history of the land law* (Oxford, 1961), pp. 22-3 and 187 and K. E. Digby, *Introduction to the history of the law of real property* (Oxford, 1897), pp. 393-400.

¹⁷ Willman, *op. cit.* pp. 43-6.

the germs of later-developed feudalism, and that the Saxons brought such a society to England;¹⁸ second, to a text where Blackstone, talking of certain aspects of Saxon society, describes certain customs as resembling 'the feudal constitution', and he supposes they might have been brought by the Saxons to England 'in the primitive moderation and simplicity of the feudal law';¹⁹ and third, to Blackstone's account of the tenure of free and common socage which Blackstone considers to be both Saxon and feudal in origin.²⁰ A text which Willman does not refer to, but which strengthens his case, is that in which Blackstone explains how free and common socage may be both feudal and Saxon because 'feuds were not unknown among the Saxons', referring back to his surmise that the Saxons may have brought the germ of feudalism to England.²¹ By making socage tenures general, 12 Car. II, c. 24 helped restore the ancient constitution. Willman also refers to the familiar passages where the *Commentaries* describe the distortion of feudalism by the Normans and Norman lawyers which he interprets as referring to the perversion of Saxon primitive and moderate feudalism.²²

At first sight, this argument seems quite convincing; but further examination of Blackstone's description of the introduction of feudalism would suggest that his view was somewhat more complex. Blackstone's history of feudalism in England is to be found in his second book, 'Of the Rights of Things', chapters 4 to 6 and in the essay entitled 'Of The Rise, Progress, and Gradual Improvements, of the Laws of England' which concludes the fourth book of the *Commentaries*.

Taking first the account given in the second book, Blackstone initially points out that even in classical times there may be found among the Germanic peoples elements of an embryonic feudal system, whereby lands were held from superiors in return for military service.²³ He then adds:

But this feudal polity, which was thus by degrees established over all the continent of Europe, seems not to have been received in this part of our island, *at least not universally and as part of the national constitution*, till the reign of William the Norman [my italics].²⁴

He then comments that even in Saxon times it seemed that 'something similar to this was in use' but that this lacked the rigour and extent 'that was afterwards imported by the Normans'. He explains thus:

For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after, that feuds arrived to their full vigour and maturity, even on the continent of Europe.²⁵

So far this could seem to support Willman's view, though it should be noted that Blackstone specifically states that the feudal 'polity' was not part of the 'national constitution'. There follows what seems to be a crucial passage oddly enough apparently not referred to by Willman. Blackstone continues remarking that the 'introduction . . . of the feudal tenures into England, by King William', did not take place directly after the Conquest nor by the will and power of the Conqueror, but seems initially to have been made by 'the Norman barons, and others' in the

¹⁸ II *Comm.* 46-7; IV *Comm.* 413.

¹⁹ IV *Comm.* 413; II *Comm.* 48.

²⁰ II *Comm.* 79-81.

²¹ II *Comm.* 85.

²² II *Comm.* 58, 77-81 and IV *Comm.* 413, and 417-8; Willman, op. cit. p. 46.

²³ II *Comm.* 45-7.

²⁴ II *Comm.* 48.

²⁵ II *Comm.* 48.

forfeited lands granted them and was later 'universally consented to by the great council of the nation long after his title was established'.²⁶ Blackstone is here concerned to deny that the Conquest was other than an acquisition and that the introduction of feudalism was imposed: rather, the reasons behind the introduction of feudalism – he argues – were that the Normans highly regarded it as a system and the king recommended it 'to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the continent'.²⁷ The background Blackstone explains to be that, in 1085, an invasion from Denmark was feared and the kingdom was defenceless, as the Saxon 'military constitution' had been put aside.²⁸ Blackstone recounts that later the king was attended by all the nobility at Sarum where the 'principal landholders submitted their lands to the yoke of military tenure' and opines that this 'may possibly have been the aera of formally introducing the feudal tenures by law' and he quotes two laws by which *omnes liberi homines* and *omnes comites, et barones, et milites, et servientes, et universi liberi homines* introduced and ordained in general council the feudal tenures and services.²⁹ Blackstone concludes that 'This new polity therefore seems not to have been imposed by the conqueror, but nationally and freely adopted by the general assembly of the whole realm' so that the change of tenures in England was effected at once 'by the common consent of the nation'.³⁰

Blackstone's argument thus seems to be that feudalism, though introduced under William I, and as a result of his prompting, was none the less introduced by the English people, freely, by a proto-parliamentary process, and by law. He considered that 'our English ancestors probably meant no more than to put the kingdom in a state of defence by establishing a military system' but that 'the Norman interpreters, skilled in all the niceties of the feudal constitutions ... gave a very different construction to this proceeding' and thus introduced 'not only the rigorous doctrines which prevailed in the Duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations'.³¹ Blackstone stresses that the Norman lawyers acted as if the English owed everything to the bounty of their feudal lord, while in fact they did not, the whole proceedings of the re-grant of the lands having been fictitious.

Our ancestors therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth.³²

Blackstone then goes on to give a brief account of tenures, referring to William Rufus, Henry I, John and Magna Carta. In this account he discusses knight-service, which he describes as differing 'in very few points ... from a pure and proper feud, being

²⁶ II *Comm.* 48. It is interesting to note that in the first edition of the *Commentaries* Blackstone made no mention of the 'Norman barons', so that the passage much more clearly and emphatically stresses that the English *consented* to the introduction of feudalism.

²⁷ II *Comm.* 48–9.

²⁸ II *Comm.* 49.

²⁹ II *Comm.* 49–50. It is useful to note that in the first edition he is more definite that this was when the feudal polity was introduced, as he states of the events at Sarum, 'This seems to have been the aera of formally introducing the feudal tenures by law'.

³⁰ II *Comm.* 50–1.

³¹ II *Comm.* 51.

³² II *Comm.* 51–2.

entirely military, and the general effect of the feudal establishment in England'.³³ He obviously thought that knight-service, of all English tenures, most approached the feudal military paradigm, and he did not believe knight-service to have been in any way part of Saxon law, having clearly been introduced after the Conquest.³⁴ Blackstone later notes the abolition of military tenures by 12 Car. II, c. 24,³⁵ and in his chapter on modern tenures discusses socage, to which we will return later.

In his fourth book, Blackstone gives a brief account of 'the most remarkable of the Saxon laws', in which he considers 'we may reckon':³⁶

The prevalence of certain customs, as heriots and military services in proportion to every man's land, which much resembled the feudal constitution; but yet were exempt from all its rigorous hardships: and which may be well enough accounted for, by supposing them to be brought from the continent by the first Saxon invaders, in the primitive moderation and simplicity of the feudal law; before it got into the hands of the Norman jurists, who extracted the most slavish doctrines and oppressive consequences out of what was originally intended as a law of liberty.³⁷

This passage apparently gives strong support to Willman's view, as Blackstone does not mention in it a post-Conquest introduction of feudalism, stating only that the Saxons brought over a primitive form of feudalism which the Norman lawyers worked into an oppressive system: it seems obvious, however, that this should be read not only in the light of what Blackstone had already said in his second book, but also in that of what he went on to say about the Conquest in his fourth book.

He said of the invasion that it 'wrought as great alteration in our laws, as it did in our antient line of kings', and he comments that 'the alteration of the former was effected rather by the consent of the people, than any right of conquest'.³⁸ He lists various changes in the laws and states that,

the last and most important alteration, both in our civil and military polity, was the engrafting on all landed estates, a few only excepted, the fiction of feudal tenure; which drew after it a numerous and oppressive train of servile fruits and appendages; aids, reliefs, primer seisis, wardships, marriages, escheats, and fines for alienation; the genuine consequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.³⁹

Here again, then, Blackstone connects the introduction of feudalism with the assembly in 1085 of all the nobility at Sarum discussed in his second book. There were certain customs prevailing in Saxon England which may be supposed to have had their origins in primitive feudal law, but the 'fiction' of feudal tenure was introduced by the English under William the Conqueror, with its 'oppressive train of servile fruits and appendages' coming through the subsequent chicanery of Norman jurists. In Blackstone's view, there was no pre-existing Saxon feudal law.

Returning to the second book, the texts on socage tenure require discussion. They are to be found in the sixth chapter entitled 'Of the modern English tenures'. Blackstone comments that 12 Car. II, c. 24 had the result that 'all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known, and subsisting, called free and common socage'.⁴⁰

³³ II *Comm.* 62-3.

³⁴ IV *Comm.* 412-14.

³⁵ IV *Comm.* 418.

³⁶ II *Comm.* 48-52.

³⁷ IV *Comm.* 413.

⁴⁰ II *Comm.* 78.

³⁵ II *Comm.* 77.

³⁸ IV *Comm.* 414-15.

This tenure, he comments, was 'sprung from the same feodal original as the rest'.⁴¹ Blackstone discusses the etymology of 'socage' and he chooses to derive it from '*soc*' which, following Somner, he states to be a Saxon word signifying 'liberty' or 'privilege'. He prefers this derivation to that of the common lawyers who generally derived it from the Latin *soca* meaning 'plough', and thus connected the tenure with services of husbandry.⁴² Following on from this rejection of the views of even Littleton, Blackstone states:

Taking this then to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure, for the more honourable, as it was called, but, at the same time, more burthensome, tenure of knight-service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure; the preservation whereof inviolate from the innovations of the Norman conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free* and *common* socage.⁴³

After this, Blackstone describes the various forms of tenure which he classes as types of socage tenure – serjeanty, burgage, and gavelkind.⁴⁴ Blackstone in these accounts is carefully constructing an argument in favour of the view he has expressed on the Saxon origin of socage tenure. Thus, of burgage, he states that tenants holding under this tenure, by its nature, could not give plough-service, so that 'The free socage therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty ...'.⁴⁵ Again, that tenements held on burgage could be disposed of by will Blackstone considered 'pregnant proof that these liberties of socage tenure were fragments of Saxon liberty'.⁴⁶ On gavelkind, Blackstone refers to Selden's view that it predated the Conquest and had been then the general custom of the realm.⁴⁷ He lists the privileges and immunities of tenants in gavelkind and considers that they were such 'as we cannot conceive should be conferred upon mere ploughmen and peasants'.⁴⁸ He accordingly concludes that 'tenures in free socage are in general of a nobler original than is assigned by Littleton'.⁴⁹

Blackstone very obviously strongly desired to prove the Saxon origin of the socage tenures preserved by 12 Car. II, c. 24, so that they should be seen not to have originated in Norman feudalism. Blackstone, however, could not deny that socage tenure had many consequents and incidents obviously of feudal origin; and, indeed, he lists them.⁵⁰ This obviously presents him with a problem, given that he has argued that feudalism was introduced under the Normans by the free will of the English nation. He resolved the difficulty by stating that 'the feodal nature' of free socage 'may probably arise from its antient Saxon original; since (as was before observed) feuds were not unknown among the Saxons, though they did not form part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans'.⁵¹ He concludes that 'socage tenure existed in much the same state before the conquest as after'.⁵²

It is significant that Blackstone describes feudalism as a 'polity' and states that this 'polity' was adopted only after the Conquest.⁵³ Willman's argument of Norman chicane perverting primitive, free Saxon feudalism depends on Blackstone believing

⁴¹ II *Comm.* 78.

⁴⁴ II *Comm.* 81–5.

⁴⁷ II *Comm.* 84.

⁵⁰ II *Comm.* 86–9.

⁵³ II *Comm.* 50.

⁴² II *Comm.* 79–81.

⁴⁵ II *Comm.* 83.

⁴⁸ II *Comm.* 85.

⁵¹ II *Comm.* 85.

⁴³ II *Comm.* 81.

⁴⁶ II *Comm.* 84.

⁴⁹ II *Comm.* 85.

⁵² II *Comm.* 85.

there to be a continuous development of feudal institutions: Blackstone himself denies this. It is obvious that Blackstone considered knight-service to form some kind of feudal paradigm – against which, for example, he measured socage tenure – but he is quite certain that knight-service was introduced after the Conquest.⁵⁴ Willman is correct that Blackstone viewed 12 Car. II, c. 24 as broadly reasserting the ancient constitution as regards land holding; but he is wrong in so far as he claims this was because it restored the primitive feudalism that existed before Norman chicane had operated on it. Blackstone, in fact, considers 12 Car. II, c. 24 to have had this effect because it caused land tenure to revert to the position before the English nation, in a proto-parliamentary process, adopted feudalism on the prompting of William I. Socage tenure was perhaps ‘feudal’ according to Blackstone; but as it was of the undeveloped type of feudalism, it did not relate to feudalism as constituting a ‘polity’ for England. Blackstone, throughout his discussion, carefully distinguishes the new feudal polity introduced under the Conqueror from the Saxon laws:⁵⁵ he does not believe there to have been a continuous development of feudal law in England, even though feudalism was not – he believes – imposed forcibly by the Normans.

Ultimately, this perhaps may not in itself dramatically affect Willman’s more general thesis; but the problems presented by Willman’s account of Blackstone’s view of feudalism and its relationship to the ancient constitution promote reflexion on Blackstone’s motives for arguing as he did. Willman claims that Blackstone wished to present the ancient constitution as feudal: I hope it is now clear that he, in fact, did not do so, considering feudalism, as a distinct ‘polity’, only to have been introduced after the Conquest. If Blackstone did not set out to stress a continuous feudalism in England from the pre-Conquest period, why did he wish to assert, in the face of contrary evidence and authority, that socage tenure was Saxon in origin and part of the ancient constitution, and not an aspect of developed feudalism? I would like to suggest, as I have argued elsewhere, that Blackstone emphasized in his *Commentaries* what he saw as the indigenous *English* nature of the common law, so that strong nationalist sentiments may be recognized as being expressed in the *Commentaries*.⁵⁶ Feudalism was ‘Norman’ and foreign, to be rejected, like law French, as a sign of Norman tyranny.⁵⁷ Thus, Blackstone described feudal tenures as ‘slavish’, being ‘the badge of foreign dominion’.⁵⁸ It accordingly was important for Blackstone to establish that socage tenure was of Saxon origin, otherwise an important area of English law would be seen to be of ‘foreign’ origin. If this is correct, then Blackstone’s account of the introduction of feudalism and its relationship to the ancient constitution has little if anything to do with a desire to stress the continuity of English law in order to protect the position of the aristocracy.

⁵⁴ II *Comm.* 48–52. On knight-service see II *Comm.* 62–3.

⁵⁵ As well as the examples already cited, see II *Comm.* 52, where he states that William the Conqueror and William Rufus ‘kept up with a high hand all the rigours of the feodal doctrines’ which he contrasts with the actions of Henry I, who promised ‘a restitution of the laws of king Edward the confessor, or antient Saxon system’, even if he did not properly carry this out.

⁵⁶ See Cairns, *op. cit.* pp. 354–8.

⁵⁷ In III *Comm.* 317 law French is described as an ‘evident and shameful badge ... of tyranny and foreign servitude’. Cf. IV *Comm.* 416, 419 and 441.

⁵⁸ IV *Comm.* 438.